INTERIOR BOARD OF INDIAN APPEALS

Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation
v. Sacramento Area Director, Bureau of Indian Affairs

17 IBIA 78 (02/22/1989)

Related Board case:
17 IBIA 141
Reversed, No. 90-0311-WBS/PAN, 18 Indian Law Reporter 3099
(E.D. Calif. June 6, 1991)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UTU UTU GWAITU PAIUTE TRIBE OF THE BENTON PAIUTE RESERVATION
v.
AREA DIRECTOR, SACRAMENTO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 88-26-A Decided February 22, 1989

Appeal from a decision of the Sacramento Area Director, Bureau of Indian Affairs, finding that no compensation was due for the taking of a road right-of-way over tribal land.

Remanded.

1. Appraisals--Indians: Lands: Rights-of-Way--Indians: Roads--Rights-of-Way: Appraisals

   The role of the Board of Indian Appeals in reviewing a Bureau of Indian Affairs determination of fair market value in connection with the taking of a road right-of-way over Indian land is to determine whether the decision is reasonable; that is, whether it is supported by law and substantial evidence.

2. Appraisals--Eminent Domain--Indians: Lands: Rights-of-Way--Indians: Roads--Rights-of-Way: Appraisals

   When private property is taken by the United States, just compensation payable to the landowner is properly reduced by the value of benefits accruing to the landowner's remaining property as a result of the taking.

APPEARANCES: Lawrence R. Stidham, Esq., and Richard E. Olson Jr., Esq., Bishop, California, for appellant; William M. Wirtz, Esq., Acting Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation (tribe) challenges a November 24, 1987, decision of the Sacramento Area Director, Bureau of Indian Affairs (Area Director; BIA) finding that no compensation was due for the taking of a right-of-way over tribal land where the taking was for the purpose of paving existing roads and adding them to the BIA road system. For the reasons discussed below, the Board remands this case to the Area Director for preparation of another appraisal.

Background

The Benton Paiute Reservation was established by Exec. Order No. 2225 of July 22, 1915. It is located in Mono County, California, and contains 160 acres. Approximately 40 acres in the southwestern portion of the reservation have been developed for residential use. The residential lots are occupied by tribal members who have received land assignments from the tribe. The remainder of the reservation is undeveloped. A dirt road, known as Yellow Jacket Road, passes through the reservation. In addition, two loop roads, also dirt, provide access to the residential lots.

The tribe requested BIA to pave the three roads. In preparation for paving the roads and assuming responsibility for their maintenance, BIA made plans to acquire a right-of-way pursuant to 25 CFR 170.5 and 25 CFR Part 169. In July, 1984, BIA conducted an appraisal to determine just compensation for the taking of approximately 9.63 acres for the right-of-way. Although the ownership of Yellow Jacket Road was apparently in dispute at the time, the BIA appraisal report approved July 10, 1984, assumed, for purposes of the appraisal, that the road was the property of Mono County. 1/ The two loop roads were recognized as tribal property.

The appraiser determined that no compensation was due for any of the roads. He concluded that the paving of Yellow Jacket Road would be a betterment and benefit to Mono County. He also concluded that no compensation was due to the tribe for the two loop roads because paving the roads would be a special benefit 2/ "result[ing] in improved access and frontage on an improved road, improvement of surface, elimination of dust and creation of a more desirable street and elimination of maintenance problem" (1984 Appraisal Report at 10 (unnumbered)).

The tribe disputed the appraiser's assumption that Yellow Jacket Road was owned by Mono County. The appraiser then supplemented the appraisal report by memorandum dated July 12, 1984, stating in part:

> [S]hould the Tribe be considered the owner of the portion of Yellow Jacket Road which runs through the Reservation, the just compensation would be as follows: 4.9 acres at $13,500 = $66,150 or $66,000 (Rounded) * * * It is our opinion that a one-acre

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1/ BIA subsequently concluded that the county never acquired a valid right-of-way and that BIA should therefore acquire the right-of-way from the tribe. July 27, 1987, memorandum from the Area Realty Officer to the Area Roads Engineer. No title issue is involved in this appeal.

2/ "Special benefit" is defined at page 5 (unnumbered) of the 1984 report as:

"An increase in the individual property being affected by construction of the improvement. They result from the mere construction of the improvement and are peculiar to the land in question. For example, an improved system of highways enhances all property which is fairly accessible to it (General Benefits). Yet those which border or have frontage on the highway benefit by reason of that circumstance whereas others more distant do not."

parcel fronting the right-of-way has a Fair Market Value of $13,500.

In May 1987, BIA conducted another appraisal, in which it assumed that the tribe owned all three roads. In an appraisal report approved June 9, 1987, the BIA appraiser found that the value of the tribal property remaining after the taking would be greater than before the taking, because of the benefits conferred by the paving of the road. He concluded, therefore, that no compensation was due to the tribe.

By letter of July 16, 1987, the tribe requested the Superintendent, Central California Agency, to reconsider the appraiser's conclusion that no compensation was due. 3/ The Superintendent responded on September 14, 1987, stating that the results of the appraisal could not be changed because the method used by the appraiser was mandated by the Uniform Appraisal Standards for Federal Land Acquisitions (Uniform Standards). He noted that, if the tribe did not accept the compensation determination, the road construction project would have to be postponed.

The tribe appealed to the Area Director, who, in a decision dated November 24, 1987, affirmed the Superintendent. The Area Director's letter stated in part:

> In accordance with 25 CFR 169.12 [4/], compensation for the right-of-way acquired for Federal Government use and with Federal funds is based on the fair market value of the right granted.
>
> Since compensation for the right-of-way needed for construction of the Benton Road was computed in accordance with Uniform Standards for Federal Land Acquisition, which is the legal and accepted approach on Federal Land Acquisition, this office cannot change the computed compensation for the right-of-way to be acquired.

The tribe appealed to the Washington, D.C., office of BIA on December 23, 1987. On April 25, 1988, the Board received from the tribe a request to assume jurisdiction over the appeal pursuant to 25 CFR 2.19. 5/

3/ The tribe also requested a list of tribes which had had rights-of-way taken over the past ten years, with an indication of which had been compensated and which had not, and an indication of whether the "state" or "Federal" rule concerning compensation had been followed in each case. The requested information was furnished to the tribe in a July 31, 1987, letter from the Superintendent and a Nov. 18, 1987, letter from the Area Director.

4/ 25 CFR 169.12 provides in relevant part:

"Except when waived in writing by the landowners * * * the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate."

5/ 25 CFR 2.19 provides in relevant part:

"(a) Within 30 days after all time for pleadings (including extension

On April 26, the Board made a preliminary determination that it had jurisdiction over the appeal and requested the administrative record. After two more requests for the record, the Board docketed the appeal without the record on October 26, 1988. The administrative record was received on November 22, 1988. 6/ Both the tribe and the Area Director filed briefs on appeal.

Standard of Review

[1] This is a case of first impression. To the extent that it concerns the determination of fair market value, however, it is similar to cases previously considered by the Board concerning rental rate adjustments and determinations of fair rental value for Indian lands. The Board has a well-established standard of review for such cases. It has held that its role is to determine whether the adjustment or rental value determination is reasonable; that is, whether it is supported by law and by substantial evidence. If BIA's determination is reasonable, the Board will not substitute its judgment for BIA's. The burden is on the appellant to show that BIA's action is unreasonable. E.g., Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 184-185, 94 I.D. 172, 175 (1987).

As in the rental rate cases, the determination of fair market value in this case involves the exercise of judgment. The Board finds that the standard of review applicable to the rental rate cases is also appropriate to this case. The Board's task, therefore, is to determine whether BIA's determination of fair market value is reasonable or whether the tribe has shown, to the contrary, that it is unreasonable.

Discussion and Conclusions

On appeal to the Board, the tribe argues that the 1987 appraisal is flawed because it does not recognize that 9.63 acres of the reservation will be taken for the right-of-way and therefore lost to the tribe. It also argues that the appraisal incorrectly considered only the detriments and benefits to the residential lots with direct access to the roads, rather

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fn. 5 (continued)
granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review authority of the Commissioner] shall:

"(1) R ender a written decision on the appeal, or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

6/ With its opening brief, the tribe submitted a number of documents related to the matter on appeal, for the evident purpose of creating an administrative record in the event BIA did not submit one. The Board notes that some of the documents submitted by the tribe, which are clearly relevant to the matter on appeal, e.g., the 1984 appraisal, were not included in the record submitted by BIA.

than the reservation as a whole. Further, it argues that the appraisal is inconsistent with the supplement to the 1984 appraisal, which concluded that the tribe should be compensated for the taking of Yellow Jacket Road. Finally it argues that the "no compensation" determination is contrary to Area Office policy, pursuant to which other tribes have been compensated for road rights-of-way.

The Area Director argues that the 1987 appraisal employed the proper appraisal methodology for Federal acquisitions of rights-of-way, pursuant to which compensation for a partial taking must be reduced by the value of benefits accruing to the remaining property as a result of the taking. The Area Director also states that a new appraisal must be performed before the right-of-way is acquired, because valuation must be determined as of the date of taking. He therefore requests the Board to remand this case to BIA with instructions to follow the Uniform Standards in any appraisal concerning the property.

The Uniform Standards were issued by the Interagency Land Acquisition Conference in 1973 and apply to the acquisition of property by Federal agencies, including BIA. They make clear that Federal law controls the determination of just compensation for a Federal taking. Id. at 2. They specify the valuation criterion to be applied: "Under established law the criterion for just compensation, is the fair market value of the property at the time of the taking." Id. at 3 (footnote omitted).

[2] Offsetting of benefits in the case of partial takings is discussed at pages 18-21:

> A-10. Offsetting of benefits: The federal law is established that the just compensation payable by the United States for the taking of private property for public use should be reduced by benefits which are capable of present estimate and reasonable computation. Obviously, if, as a result of the project, the remainder of an owner's land is of greater value than the entire tract was before the taking, there is no reason in fairness for the owner to receive a windfall from the public treasury. * * *
>
> While the valuation is to be as of the date of taking, the benefit from the project must be taken into account. This is accomplished by applying the "before and after" rule, i.e., determining the market value of the entire tract at the time of the taking, excluding any enhancement or diminution from the project, and the market value of the remainder, including enhancement or diminution from the project.
> * * * * * *
>
> Under federal law benefits must be considered and they are nonetheless to be offset even though the same benefits are enjoyed by other lands having the same relationship to the project. An important point to bear in mind is that, unlike the law in some states which varies considerably in this respect, under federal

> law the amount of the benefits is set off not only against any so-called "severance damage," but against the entire award of just compensation; and the owner may be made whole pecuniarily by the increase in value of the remainder he retains after the partial taking. [Footnotes omitted; emphasis in original.)

The tribe appears to argue that it is entitled to be compensated for the 9.63 acres to be taken for the right-of-way without regard to the Federal rule requiring offsetting of benefits. Insofar as this is the tribe's argument, it is rejected in light of the Federal law to the contrary. BIA's determination to abide by Federal law is clearly reasonable.

The tribe also argues that the BIA appraiser incorrectly designated the residential lots, rather than the reservation as a whole, as the parcels to be appraised for just compensation purposes. The tribe contends that the residential parcels were improperly chosen because they do not include any significant portion of the 9.63 acres to be taken. Rather, according to the tribe, the land to be taken consists primarily of land presently occupied by the dirt roads, which is part of the reservation, but not part of the residential lots.

Explaining his choice of the residential lots as the relevant parcels, the BIA appraiser stated:

> The first step in an appraisal for just compensation purposes is to delineate the larger parcel and then to value it as it exists prior to the acquisition of the particular right-of-way to be appraised. The three tests of what constitutes the larger parcel are unity of use, unity of ownership and contiguity.
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> * * * * * *
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> * * * In Benton, Tribal members are assigned residential lots for homesite purposes. Of the 43 one acre lots now developed, all except two have been assigned. The assignments are akin to a life estate if it were in fee owned properties. * * * According to the Reservation Ordinance on assignments, the assigned land is owned by the Tribe. The Tribe reserves the right to grant easements and rights-of-way over assigned lands for public purposes. Thus, ownership and use of the property is by tribal members acting through the Tribal Council.
>
> Contiguity is a more difficult concept to apply here. The taking will involve a road right-of-way through the portion of the Reservation on which a tribal residential subdivision is located. The main impact of the project will be on the residential lots, improved or not, which border the road. The balance of the property is affected also, in that superior access will be afforded to the undeveloped land surrounding the residential usage. It would appear that the contiguity element is assured if one can remember that the use and ownership is of a community nature and

> the tribal members own and use the whole property subject to the assignment rights of each member affected by the project.
>
> To this appraiser, the larger parcel is the one acre residential assignments which the right-of-way will impact.
>
> * * * * * *
>
> Therefore, for purposes of this right-of-way appraisal, we have designated the larger parcel as each individual one-acre residential lot and not a 160 acre parcel.

(1987 Appraisal Report at 8-10).

The Uniform Standards indicate that the determination of what constitutes the "larger parcel" is relevant to the calculation of severance damages, inter alia. 7/ They state at page 21:

> With respect to what constitutes a single tract, whether lands owned by the same owner may be considered as a single tract for the purpose of allowance of severance damages is a question frequently difficult to determine. * * * [G]enerally, severance damages should be considered only when there exists exact identity of ownership, unity of use of the lands, and physical contiguity.

The BIA appraiser concluded that the reservation as a whole did not qualify as a single tract under this analysis and that, therefore, the residential lots were the appropriate tracts to be considered. The difficulty with the appraiser's conclusion is that, as far as can be determined from the maps included in the administrative record, the roads are not encompassed within the residential lots. If this is the case, the taking cannot be considered a taking from the lots, and designation of the residential lots as the larger parcel would not be reasonable.

On remand, BIA should reconsider the designation of the "larger parcel." Unless it can be shown that the roads are part of the residential lots, the lots should not be designated as the larger parcel. Rather, BIA should consider designating the reservation as a whole or, perhaps, the residential portion of the reservation, as a whole, as the larger parcel.

The tribe also argues that the 1987 appraisal is inconsistent with the July 12, 1984, supplement to the 1984 appraisal, which concluded that, if the tribe is considered the owner of Yellow Jacket Road, it should be compensated in the amount of $66,150 for the taking of 4.9 acres for that road.

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7/ "When the United States acquires only part of a single tract in one ownership, if the taking diminishes the value of the remainder, the owner is entitled to compensation for the losses as for a taking. Although 'somewhat loosely spoken of as severance damages,' it is an 'element of value arising out of the relation of the part taken to the entire tract.'" Id. at 21 (footnotes omitted).

The July 1984 memorandum does not explain its recommendation. It also fails to explain why the appraiser considered the tribe to be entitled to compensation for Yellow Jacket Road but not for the other two tribally owned roads to be taken.

The Area Director's brief contends that the July 1984 memorandum reflects a failure of the BIA appraiser to follow the Federal rule requiring offsetting of benefits. On remand, the BIA appraiser should follow Federal law in calculating just compensation for the taking of the three reservation roads.

The tribe's final argument is that the "no compensation" determination of the 1987 appraisal is in conflict with Area Office policy, pursuant to which other tribes have been compensated for road rights-of-way. The record includes a July 31, 1987, letter from the Superintendent to the tribal chairman listing eleven right-of-way acquisitions between 1973 and 1987. The letter shows that compensation was paid in six of the eleven cases. The circumstances surrounding the eleven acquisitions are not described, nor are the appraisal reports supporting the determinations included in the record. The compensation determinations should have been based on the facts of each case, however, and the tribe does not argue that they were not so based. The fact that compensation was paid in other cases is not a basis for concluding that the determination in this case is in error.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and pursuant to the Area Director's request, this case is remanded for preparation of another appraisal. The appraisal shall be prepared in accordance with this opinion.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge